

Division of Global Migration and Quarantine  
Centers for Disease Control and Prevention  
U.S. Department of Health and Human Services  
Attn: Part 34 NPRM Comments  
1600 Clifton Road, NE, MS E-03  
Atlanta, GA 30333

July 30, 2009

Re: Docket # CDC-2008-0001

Docket Title: Medical Examination of Aliens – Removal of Human  
Immunodeficiency Virus (HIV) Infection from Definition of Communicable  
Disease of Public Health Significance  
RIN: 0920-AA26

Dear Sirs/Madams:

**INTRODUCTION – IMMIGRATION EQUALITY FULLY SUPPORTS  
THE PROPOSED REGULATIONS**

Immigration Equality submits these comments in complete support of the Department of Health and Human Services' ("HHS") proposed regulations to amend 34 CFR § 34.2 to remove HIV from the list of "communicable diseases of public health significance," and to amend 34 CFR § 34.3 to remove the requirement that aliens who are required to undergo a medical examination be tested for HIV.

The HIV ban on travel and immigration has been a scourge on U.S. policy for over two decades. Long after medical understanding of HIV made it clear that the virus is only transmitted through specific limited means: unprotected sex; sharing intravenous needles; giving birth; and possibly breast-feeding, U.S. immigration policy has continued to treat HIV as though it were an airborne, contagious disease. Moreover, while in the late 1980s when HIV/AIDS was first added to the HHS list, treatment options were extremely limited, the past two decades have seen incredible advances in HIV treatment. This has led many in the medical community to see HIV as a manageable, chronic illness.

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Immigration Equality is a national organization that works to end discrimination in U.S. immigration law, to reduce the negative impact of that law on the lives of lesbian, gay, bisexual, transgender (“LGBT”) and HIV-positive people, and to help obtain asylum for those persecuted in their home country based on their sexual orientation, transgender identity or HIV-status. Immigration Equality was founded in 1994 as the Lesbian and Gay Immigration Rights Task Force. Since then we have grown to be a fully staffed organization with offices in New York and Washington, D.C. We are the only national organization dedicated exclusively to immigration issues for the LGBT and HIV-positive communities. Over 15,000 people subscribe to our monthly e-newsletter, and nearly 20,000 unique visitors consult our informational website each month. Our legal staff answers more than 1,500 queries annually from individuals throughout the entire U.S. and abroad via telephone, email and in-person consultations. Our Legal Director, Victoria Neilson, has presented Continuing Legal Education trainings on HIV and immigration for many organizations, including: the American Immigration Lawyers Association, the Rocky Mountain Survivors Center, and the New York City Bar Association.

As an immigration provider with a unique expertise in HIV immigration issues, we intend to focus our comments on the many problems we have encountered with the current law which renders all foreign nationals with HIV inadmissible and requires them to undergo a waiver process. We have found that this process is often administered inconsistently, arbitrarily, or, for many, completely unavailable because they lack the required qualifying relatives. We understand that other organizations with medical expertise will focus on other aspects of the proposed regulation; we will focus our comments on the impact the HIV ban has had from an immigration perspective.

### **Short Term Non-immigrant Visas**

There are currently only a dozen countries, including the United States, which prevent HIV-positive individuals from even entering the country for a short-term visit: Armenia, Brunei, Iraq, Libya, Moldova, Oman, Qatar, the Russian Federation, Saudi Arabia, South Korea, and Sudan. In addition to putting the U.S. on equal footing with countries which are not known for their strong human rights records, the HIV ban has done immeasurable damage to the U.S. economy and to our image as a global leader in the fight against HIV.

### **The HIV Ban Has Prevented the U.S. from Hosting Conferences**

The existence of the HIV ban has meant that the United States has not hosted a major AIDS conference in two decades. In 1992, the International AIDS Conference had been scheduled to be held at Harvard University but when HHS was unable to remove the HIV ground of inadmissibility, the conference was moved in protest and the U.S. has not hosted a major HIV conference since.<sup>1</sup> The International AIDS Conference has declared its intention to host the 2012

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<sup>1</sup>Peter Barta, “Lambskin Borders: an Argument for the Abolition of the United States Exclusion of HIV-positive Immigrants,” *GEORGETOWN IMMIGRATION LAW JOURNAL*,



conference in Washington D.C., but only if the U.S. lifts the HIV ban. Hosting the International AIDS Conference will be a huge step forward for the U.S. in donning the mantle of world leader on this issue. The conference brings the leading medical experts in the world together to discuss best practices, and generally draws 25,000 participants.<sup>2</sup>

### **Leaders in HIV Work Have Been Barred from Entering the U.S.**

Although the HIV ban has prevented the largest AIDS conferences from being held in the U.S., there have been domestic conferences on HIV related issues which have drawn some international participants. Nonetheless, as recently as last month, the U.S. has prevented HIV-positive travelers from attending a conference because they had not had time to seek individualized waivers.

*Just last month, in June 2009, 60 HIV-positive Canadians were prevented from entering the United States to attend the North American Housing and HIV/AIDS Research Summit in Washington, D.C. Although the event had apparently begun the process of seeking Designated Event Status for HIV waivers in March 2009, in late May, just 11 days before the start of the conference, the participants were told that they would have to seek individual waivers. Because the waivers are intrusive and take time, the participants apparently did not attend the conference.<sup>3</sup>*

It may be that those who wished to attend this conference had to seek individual waivers because the process for an event to obtain "Designated Event Status" is so lengthy and complicated.

### **The HIV Ban Has Hindered the Ability of the U.S. to Act as a World Leader in the Fight against HIV/AIDS**

The hurdles involved in obtaining a waiver have also made it difficult for the U.S. to provide necessary training to foreign nationals who are providing prevention education at home.

*Jean is a peer educator in Uganda. She is doing pioneering work in her country, being open about her own HIV status as a mother and widow. Despite her work as the East*

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Winter 1998 at 31.

<sup>2</sup>"AHF to IAS: Return Int'l Aids Conference to U.S. in 2012," Reuters, March 31, 2009, available at <http://www.reuters.com/article/pressRelease/idUS98748+31-Mar-2009+BW20090331>.

<sup>3</sup>See "BARRED! Up to 60 Canadians living with HIV denied entry to U.S.; AIDS groups outraged," Housing Works AIDS Issues Update, available at <http://www.housingworks.org/news-press/detail/housing-works-expresses-outrage-that-up-to-60-canadians-living-with-hiv-den#permalink>

*Africa Regional Coordinator for the International Community of Women Living with HIV/AIDS, Jean had great difficulty obtaining a short-term visa to come to the U.S. It was only through intervention by the U.N. on her behalf that her waiver was eventually granted. If she had not had this connection, and this special support, she probably would never have gained entry to the U.S. where she gained valuable training for her HIV prevention work in Uganda.<sup>4</sup>*

It is impossible to know how many other HIV educators who were not fortunate enough to have ties to the United Nations were never able to reach the U.S. to obtain vital training here. It is also impossible to know how many lives Jean's training may have saved as she learned improved techniques to educate other Ugandans about HIV prevention.

## **BACKGROUND ON SHORT-TERM WAIVERS**

### **No Waivers for Ordinary Tourism**

Although short-term waivers to the HIV ground of inadmissibility are available, the application process is burdensome, and they are often difficult to obtain. In the fall of 2008, DHS issued regulations which offered a streamlined waiver process for visitors of under 30 days. Until the issuance of this regulation, the primary guidance for adjudicating HIV waivers was found in an INS internal memorandum from 2002 by Johnny Williams, titled, "Medical Examinations, Vaccination Requirements, Waivers of Medical Grounds of Inadmissibility, and Designation of Civil Surgeons and Revocation of Such Designation,"<sup>5</sup> hereinafter, "Williams Memo."

The Williams Memo specified that "routine" 30 day waivers were available for "humanitarian reasons," which included, "to attend conferences, receive medical treatment, visit close family members, or conduct business."<sup>6</sup> Notably absent from this list was the ability to obtain a waiver for an ordinary visit or short-term tourism.

*Henri is a French citizen. He had traveled frequently to the U.S. and in 1992 he won the Diversity Visa lottery. During the final stages of his application for permanent residence,*

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<sup>4</sup>Unless otherwise noted, all individual stories are based on conversations Victoria Neilson or other Immigration Equality staff have had directly with the individuals mentioned. Names have been changed to preserve the individuals' confidentiality.

<sup>5</sup>Williams, Johnny, "Medical Examinations, Vaccination Requirements, Waivers of Medical Grounds of Inadmissibility, and Designation of Civil Surgeons and Revocation of Such Designation," available at <http://www.immigrationequality.org/uploadedfiles/2002%20HIV%20Immigration%20policy%20memo.pdf>

<sup>6</sup>*Id.* at page 25



*he learned that he was HIV-positive. He had no American relatives and so could not seek a waiver. Since his immigration file now labeled him as HIV-positive, he could no longer come to the U.S. as a tourist. Henri still loves to travel, but has not come back to the U.S. As a tourist, he probably would not have qualified for a "humanitarian" waiver and as someone seeking merely to travel abroad for pleasure, he did not have any interest in visiting (and spending his money in) a country that through its policy made it clear that he was unwelcome.*

Under the terms of the Williams Memo, even those travelers who could demonstrate "humanitarian" reasons for their visit were not guaranteed entry. They were also required to show that: "he or she is not currently afflicted with symptoms of the disease; . . .there are sufficient assets such as insurance that would cover any medical care that might be required in the event of illness while in the United States; and that the visit will not pose a danger to public health in the United States."<sup>7</sup>

### **The HIV Ban Has Unfairly Discriminated against Gay Travelers**

While all applicants for visas, or for admission under the Visa Waiver Program, are asked whether they have a communicable disease of public health significance, many individuals clearly do not understand this question. Because of the complicated construction of the question, many individuals who do not speak English fluently may not understand the question at all. For others with a full grasp of the language, they may truthfully believe that their HIV virus is neither readily communicable nor going to affect the U.S. public health. Anyone seeking to enter the U.S. may be subject to more in-depth, secondary inspection at airports or ports of entry, if an airport inspector suspects that he is HIV-positive.

*In June 2005, Fernando Pena, a gay, HIV-positive actor from Argentina was denied entry into the U.S. where he intended to attend the wedding of his brother. Pena had entered the U.S. on numerous occasions before including a visit to perform at the Latin American MTV Video Music Awards in Miami. Pena was interrogated for over two hours and ultimately his visa was canceled, simply because he acknowledged to inspectors at the airport that he was HIV-positive.<sup>8</sup>*

### **The "Streamlined" HIV Waiver**

Last year DHS purported to take a step towards easing the HIV travel ban by issuing a final

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<sup>7</sup>*Id.* at page 25.

<sup>8</sup>See "Gay HIV-positive actor denied U.S. visa," *The Advocate*, 6/23/05, available at [http://www.advocate.com/news\\_detail\\_ektid17981.asp](http://www.advocate.com/news_detail_ektid17981.asp); see also, "Fernando Peña dice que fue discriminado por EEUU que le negó la visa por tener HIV," available at <http://www.clarin.com/diario/2005/06/07/um/m-991208.htm>.

regulation which “streamlines” the waiver process. Under the “streamlined” process, consular officials are given the authority to grant 30 day waivers without having to obtain approval from the United States Citizenship and Immigration Services (“USCIS”) in the United States. Nonetheless, waiver applicants are still required to meet most of the requirements of the Williams Memo, including proof that the individual does not show “symptoms” which are “contagious;” that he or she has adequate medical insurance; and proof that he or she knows how HIV is transmitted. In April 2009, USCIS issued a checklist that HIV-positive travelers could use to meet these requirements.<sup>9</sup> Nonetheless, those seeking entry with the “streamlined” waiver, must agree to give up the ability to seek any change or adjustment of status while in the U.S. and he or she can also only enter the U.S. for a maximum of 30 days.

Although a “streamlined” waiver process is a slight improvement over the former lengthier waiver process, the fact remains that HIV is treated unlike any other illness under this process. Moreover, even though the “streamlined” process may be faster than the process outlined in the Williams Memo, the delay entailed may prevent travelers from coming on short notice or prevent travelers from wishing to come at all to a country which does not appear to want them here.

#### **The “Designated Event Status” Waiver Process Is so Cumbersome that it Has Rarely Been Used**

Although the Williams Memo also provides for a “blanket waiver” for participants in certain events, such as conferences or sports events, that have been given “designated event status,” (“DES”) the process for an event to obtain this status is so complicated and difficult that only a handful of events have applied for the status.

In theory, this type of waiver allows an event, such as the Gay Games,<sup>10</sup> to seek DES status, meaning that foreign nationals who are HIV-positive and want to attend the event can enter the U.S., after self-identifying as being HIV-positive, without having to make an individualized showing about their knowledge of transmission modes or insurance coverage. As the Williams Memo spells out, however, obtaining DES status requires four levels of review from three different agencies. The event sponsor must first write to HHS. If HHS determines that the event is in the public interest, it writes a letter to the Department of State. The Department of State must then ask the Attorney General to exercise favorable discretion under INA §212(d)(3), and if the Attorney General approves, then a cable is sent to the consulates. Williams Memo at 25. Moreover, despite the term “blanket waiver,” individuals who are HIV-positive are still required to self-identify as being positive, meaning that their immigration file is forever marked with that status and they can never again enter the U.S. without obtaining an individualized waiver. Not

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<sup>9</sup>See INA 212(a)(1)(A)(i) Waiver Certification, *available at* [http://www.immigrationequality.org/uploadedfiles/check\\_off\\_sheet.pdf](http://www.immigrationequality.org/uploadedfiles/check_off_sheet.pdf)

<sup>10</sup>The process is so burdensome that the Chicago Gay Games began the application for DES status more than a year before the Gay Games were scheduled to take place.



surprisingly, many international events which might involve HIV-positive participants have chosen to relocate to other countries.

### **The HIV Ban Is Both Over-inclusive and Under-inclusive**

Under current policy, HIV-positive travelers are asked to self-disclose that they have a communicable disease of public health significance. No one has ever seriously suggested testing every foreign national who passes through the United States annually, since this number is estimated at over 50 million.<sup>11</sup> Yet there have clearly been many travelers who have entered the U.S. without disclosing their status.

*"You're not really allowed to go to the USA if you're HIV-positive. On the immigration forms it always says, 'Do you have any contagious illnesses or diseases?' and I just put 'no' because I think it's not contagious unless you sleep with me, and we have unprotected sex. I've been stopped (by customs agents) before and they asked, 'What are these?' and I said, 'My combination therapy,' and they just let me go. ... As long as you're courteous you're going to be fine."<sup>12</sup>*

With no testing requirement for short-term visitors, the United States has essentially relied on an "honor system," asking visitors to self-disclose their status. Many have probably failed to understand the question "do you have a communicable disease of public health significance?" Others have weighed the pros and cons of being honest, like the above traveler, and determined that it is better not to self-disclose. It has therefore been possible for some HIV-positive travelers to circumvent the ban while others, who do not pose a risk have been excluded.

### **Individuals Who Pose No Threat to the Public Health Have Been Denied Entry**

While some individuals simply enter the U.S. without disclosing their status, many others do disclose their status to inspectors and pay the consequences.

*Martin is a Canadian citizen who is lawfully married to Bruce, a U.S. citizen. The couple relocated to Canada because U.S. immigration law does not recognize their relationship. The American Bruce, suffers from cancer and has been coming to Massachusetts regularly to receive treatment. Despite being HIV-positive, Martin is in good health, and as a Canadian citizen who enjoys free health coverage, he has no interest in obtaining medical care in the U.S. But because Martin is HIV-positive, he has been unable to come*

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<sup>11</sup>"2007 Sets All Time International Tourism Record For U.S., Over 56 Million International Visitors Spent 122 Billion," available at [http://www.commerce.gov/NewsRoom/PressReleases\\_FactSheets/PROD01\\_005355](http://www.commerce.gov/NewsRoom/PressReleases_FactSheets/PROD01_005355).

<sup>12</sup>"Erasure singer Andy Bell to Passport magazine," June 2009 issue, available at <http://www.gaylesbiantimes.com/?id=15049>

*to the U.S. to support Bruce while he undergoes cancer treatment. Bruce had to attend his mother's funeral alone because Martin could not accompany him to the U.S. Recently, the couple broke up, in large measure because of the toll that U.S. immigration policy took on their relationship.*

It may have been possible for Martin to seek a "humanitarian" waiver but it would not have served his purpose. Getting a waiver approved can take several weeks. Martin would not have been able to accompany Bruce to the U.S. when Bruce was seeking emergency treatment, since the waiver process is slow, nor would he have been able to remain with Bruce for the duration of his treatment since waivers are only available for 30 days. Further, it is not clear whether Martin's desire to enter the U.S. to provide support to his ailing husband would even have qualified as a "humanitarian" goal since U.S. immigration law provides no recognition of their relationship.

### **It Is almost Impossible to Obtain an HIV Waiver for a Long-Term Non-Immigrant Visa**

Under the Williams Memo, the only waivers cited as being available for non-immigrants, are the Designated Event Status waiver and the "routine" waiver which is available for a maximum of 30 days. When DHS published its "streamlined travel regulations," last year, it stated that there has always been a "case by case" waiver available. Since this waiver is not even mentioned in the Williams Memo, it is difficult to imagine how a foreign national would know that this possibility existed. Indeed, Immigration Equality, one of the country's leading legal experts on the HIV ban, has only heard of two foreign nationals being granted a long-term NIV waiver, although we answer hundreds of questions about the HIV ban every year.

### **THE HIV BAN AND LAWFUL PERMANENT RESIDENCE**

Despite the myriad wrongs involved in the HIV travel ban, the HIV ban on immigration has undoubtedly wrought more harm, keeping families apart, depriving businesses of needed workers, and uprooting foreign nationals who have made their lives here. Although, under current law, there is a waiver available for some, there are many foreign nationals who are completely foreclosed from obtaining lawful permanent resident ("LPR") status simply because they are HIV-positive.

### **Some Family Relationships Are not Sufficient to Obtain Waivers**

Under current law, family relationships are the backbone of the immigration system. Immediate relatives of U.S. citizens may apply for lawful permanent residence simultaneously with their visa application, while those who fall under the family preference system must wait for their priority date to become current to seek lawful permanent residence. There are two categories of family members which, inexplicably, are considered close enough to support a family-based visa application, but not a waiver for HIV inadmissibility. These categories are adult married sons and daughters of U.S. citizens and siblings of U.S. citizens.



*Thomas is a special education teacher. His school has sponsored him for lawful permanent residence because of his specialized skill in providing desperately needed services to a needy and under-served population. Although he has a U.S. citizen parent, for years Thomas was ineligible to apply for a waiver because he was married to a wife who remained in the West Indies. Because of this irrational law, Thomas had been placed in the untenable position of contemplating a "sham divorce" so that he could get his green card because he could only qualify for an HIV waiver as the "unmarried son of a U.S. citizen." He did not want to do this, however, because he wanted to bring his wife to the United States after obtaining his own residence. While his application was pending, Thomas was present in the U.S. working and, had good health insurance. He posed no risk to the U.S., while providing a valuable service, yet under current law, could not obtain his green card. Sadly, Thomas's wife recently passed away, which made it possible to file his green card application. He recently heard that his application had been denied, however, for failure to prosecute.*

Similarly, siblings of US citizens cannot obtain a waiver.

*Wilfredo has been living in the United States for over a decade, and fell out of lawful status long ago. His brother is a U.S. citizen who filed a visa application for him in the early 1990s. Wilfredo's priority date is finally current, and he would be eligible to apply for his green card under Section 245i of the Immigration and Nationality Act if he paid a \$1000 penalty fee. However, because a U.S. citizen sibling is close enough to sponsor a foreign national for lawful permanent residence, but not for an HIV waiver, Wilfredo is stuck in limbo, unable to file his application for lawful permanent residence. If Wilfredo could move forward with his application, he could obtain work authorization and begin to pay taxes. Instead, he is stuck with no work authorization, and can only pay for his HIV medication through the publicly funded AIDS Drug Assistance Program. He is already in the U.S. and has no plans to leave. It is difficult to see any public health rationale to denying him a waiver and the ability to improve his legal status here.*

### **The HIV Ban Unfairly Discriminates against LGBT Families**

Although the majority of LPR applications are granted to close relatives of American citizens and lawful permanent residents, there is currently no way for a U.S. citizen or LPR to sponsor a same sex partner. Even if the couple is lawfully married because the Defense of Marriage Act prohibits any federal recognition of same sex marriages. This means that gay and lesbian foreign nationals in long term relationships with U.S. citizens or LPRs are most likely to obtain LPR status through employment based immigration, if they are able to fulfill the difficult criteria under these visa categories. Gay foreign nationals encounter almost insurmountable obstacles, however if they are also HIV-positive. Unable to have their U.S. partner sponsor them for visas, the American partner is also not considered a "qualifying relative" for the HIV waiver, often leaving gay, HIV-positive foreign nationals with no options.

*Guillame is a citizen of France. He came to the U.S. as an intra-company managerial transfer to a large bank and fell in love with an American man. Guillame became a valued employee and the bank asked its attorneys to prepare the EB1 -3 petition for his permanent transfer and immigration. Regrettably, Guillame had to tell the lawyer that he had recently become infected with HIV and that he did not have a DHS-recognized qualifying relative in the US for the waiver. With that, the attorneys advised him that his case for LPR status could not be pursued. Guillame's American partner was so distraught by Guillame's inability to remain in the U.S. that he committed suicide.*

### **Individuals Seeking Lawful Permanent Residence through Employment Are Generally Unable to Obtain Waivers**

The employment-based system of immigration in the U.S. is based on the perceived need of the American labor market; its intended beneficiary is the U.S. economy, not the individual immigrant. As such, employment-based petitions for lawful permanent residence are weighted towards highly educated, highly skilled individuals, or individuals who possess skills that are otherwise unavailable in their communities. This system has already made a value judgment that these individuals will benefit the U.S. economy. Moreover, since by definition these applicants are employed, the majority of them have employer-based private health insurance. Nevertheless, no matter how valuable the work the individual intends to do, unless he or she has a qualifying relative, he or she cannot even seek a waiver here.

*Mouloud is a citizen of Algeria who was being sponsored for a green card by his employer. Mouloud is a computer programmer. He was placed in removal proceedings for failing to complete special registration. He filed for adjustment of status before the immigration judge based on his approved labor certification. During the application, he took a medical exam and learned that he was HIV-positive. When the judge learned that he was HIV-positive, she informed him, for the first time, that he could not get his green card because of his status. Mouloud was fortunate enough to qualify for asylum based on his sexual orientation and HIV-positive status. Ironically, he is now eligible for public benefits to pay for the cost of his HIV treatment, which he would not have needed, had he continued to be employed by his original sponsoring company.*

### **Waiver Applications Are Frequently Adjudicated Improperly**

Even for those HIV-positive applicants who do have the qualifying relatives to seek an HIV waiver, and for those who meet the other stringent criteria, the application process itself has often been nightmarish. Since form I-601 which is used for the HIV waiver is a generally used waiver form for many other grounds of inadmissibility under the Immigration and Nationality Act, adjudicating officers at USCIS frequently apply the wrong legal standard in adjudicating HIV related I-601s. While many other categories of waivers require the applicant to demonstrate that his or her removal from the U.S. would result in hardship to a qualifying relative, there is no such



hardship requirement for HIV waivers. Nevertheless, Immigration Equality has responded to dozens of inquiries from immigration practitioners and HIV-positive individuals filling out waiver applications who have been asked to prove a hardship element that does not exist. Beyond meeting the difficult requirements of the I-601 waiver, HIV waiver applicants also must frequently be knowledgeable enough of the law to educate the adjudicator about the waiver process or face having their waiver application denied for failure to meet a standard which was not actually required under the law.

### **Family Members Doing Consular Processing Often Face a Catch-22 with Health Insurance Requirements**

In many cases, even for applicants who do have a qualifying relative in the U.S., it is impossible to meet the requirements of the I-601 waiver, particularly the requirement that the individual prove that he or she will not incur any cost to any U.S. government agency without the agency's prior consent. This requirement has generally been interpreted to mean that a waiver applicant must have private health insurance. However, lawful permanent residence applicants who are outside the U.S. and trying to obtain health insurance in the U.S., often find themselves in a Catch-22 because they cannot come to the U.S. at all without a waiver, but they cannot get health insurance in the U.S. until they are physically present here and have a social security number.

*Chris was serving in the U.S. military in Tanzania when he met his future wife Adimu. Before marrying, she disclosed to him that she was HIV-positive. The couple married and Chris returned to the United States and submitted the paperwork to Immigration to petition to bring Adimu to the U.S. Although Chris is a police officer and submitted a letter to the consulate in Kenya that his wife would be covered under his insurance once she came to the U.S., the consulate rejected this because she was not currently covered. Chris then submitted a letter from his local AIDS Drug Assistance Program (ADAP) explaining that, if necessary, Adimu's HIV medical expenses would be paid for by ADAP and that ADAP consented to such payments. Again, the consulate rejected this evidence because the ADAP letter did not specify that the agency would pay for any potential hospitalization. In all Chris and Adimu struggled for nearly two years before Adimu was finally able to enter the U.S.*

### **Consulates Apply the Rules Inconsistently**

We have found that different consulates apply HIV waiver rules unevenly. Waiver applicants from developed parts of the world, such as Western Europe, have been able to obtain waivers relatively easily, providing they have the qualifying relative to apply. In contrast, similarly qualified waiver applicants from parts of the world with the highest HIV prevalence have been met with hostility at the consulates, where the officers just seem to just want to keep HIV-positive non-citizens out of the U.S. no matter what. In our experience, applicants who come from Africa, even spouses of U.S. citizens are unlikely to obtain an HIV waiver unless they are extremely wealthy.

## **USCIS Does a Bad Job Too**

USCIS, and INS before it, has done a bad job administering and adjudicating the HIV waiver process. It took well over a decade for USCIS to update its form I-601 and make the HIV waiver supplement readily available. Before that the form was not available on its website or in most USCIS offices; advocates had to share the supplement among themselves. The waiver form, I-602, used by asylees or refugees seeking adjustment of status, still does not have an HIV waiver supplement available on the website.

Inexplicably, USCIS instructions provide that individuals seeking an I-601 waiver for tuberculosis are exempt from paying the waiver fee, but individuals seeking the HIV waiver, must pay the fee which is currently \$545. USCIS has never offered an explanation as to why it treats two different “communicable diseases of public health significance” differently, excusing fee payment in one case but not the other.

## **Even LPR Applicants with Humanitarian Based Applications Are Adversely Affected by the HIV Ban**

Asylees are eligible to adjust status to LPR one year after obtaining status. Rather than use an I-601 waiver, they can use an I-602. Waivers are supposed to be granted liberally based on humanitarian grounds, yet, we have seen inconsistent adjudications with multiple Requests for Evidence (“RFE”s) by USCIS which appear to serve no purpose other than to harass the applicant and delay the ultimate granting of the lawful permanent residence application.

*Gabriel was granted asylum in 2006, based on his gay sexual orientation and HIV-positive status. Immigration Equality represented him in his application for LPR status. Gabriel received several RFEs requiring further medical evidence that he did not have active tuberculosis, although he had never tested positive for TB. We complied with the additional requests and then received another RFE concerning his application for an HIV waiver. This time USCIS returned the completed I-602 with the HIV supplement and asked that Gabriel instead use the TB supplement form. We wrote to USCIS that this was improper but they again sent us an RFE with the instructions that we should “cross out” the TB references and fill in HIV. Gabriel did this and his HIV provider signed the form, however when Gabriel brought the signed form to the New York State Department of Health, the official refused to sign the form since it had been altered, citing its own instructions from the Centers for Disease Control on how to properly complete the form. We then had to obtain a letter from New York State DOH explaining why it could not sign off on the TB form for an HIV waiver. Finally, Gabriel was granted his LPR status, but not until he endured a year of delays, meaning that his ability to apply for citizenship has been pushed back a year.*

It is worth noting that for applicants like Gabriel, there is really no public health justification for denying or delaying the granting of his LPR status. As an asylee, Gabriel is entitled to remain in



the U.S. indefinitely. He is already residing in the U.S. permanently, so any theoretical danger he could pose to the U.S. public health already exists. The RFE delayed his ability to become an LPR, which means that it will take longer for him to be eligible to apply to become a U.S. citizen and be fully integrated into U.S. society. This discriminatory treatment conflicts with international law requiring countries to fully integrate their asylees and refugees as expeditiously as possible.<sup>13</sup>

### **The Cuban Adjustment Act**

The Cuban Adjustment Act (“CAA”) essentially provides a short-cut to asylee adjustment for Cubans. Once a Cuban has been on U.S. soil for one year, he or she can apply for lawful permanent residence. The idea behind this is that the U.S. recognizes the government mistreatment in Cuba and will allow Cubans to remain here permanently as a result without having to make an individualized showing of future persecution. Yet, inexplicably, an HIV-positive CAA applicant cannot use form I-602; instead he or she must meet all of the requirements for the I-601 waiver, even though the U.S. government has made a policy decision that Cubans should not be forced to return to Cuba.

*Jose was paroled into the U.S. from Cuba in 1980. He lived and worked in the U.S. for over 15 years, and was probably infected with HIV here. In 2006 when he went to renew his parole document, he was placed into removal proceedings because he had never applied for lawful permanent residence. Because he is HIV-positive and has no qualifying relative in the U.S., however, he is ineligible to apply for an HIV waiver, even though he's been in the U.S. for most of his adult life and was infected here. Because there is no humanitarian waiver under the Cuban Adjustment Act, Jose had to apply for asylum and make an individualized showing that he had a well founded fear of future persecution. If he had not been able to make this showing, he would have faced deportation to Cuba, simply because he is HIV-positive.*<sup>14</sup>

The adjudication of CAA cases is another example of the irrationality of the HIV ban and how, as applied, it has not protected the public health. Under the CAA, Cubans can remain in the U.S. indefinitely with parole status, living and working here. It is only at the point that they seek to adjust their status to lawful permanent residence, that being HIV-positive leads to possible removal. This is another example of the HIV ban hurting people who are already in the U.S., without serving any public health function.

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<sup>13</sup> See, Jaya Ramji, “Legislating Away International Law: The Refugee Provisions of the International Immigration Reform and Immigrant Responsibility Act”, 37 Stan. J. Int’l. L. 117, (2001).

<sup>14</sup> See also, “HIV immigrant ban complicates Cuban’s asylum request; Attorney says gay man faces persecution, quarantine,” By LOU CHIBBARO JR, Washington Blade | May 20 2009, [http://www.sovo.com/thelatest/thelatest.cfm?blog\\_id=25461](http://www.sovo.com/thelatest/thelatest.cfm?blog_id=25461)

## THE COST OF ENDING THE HIV BAN

As an immigration organization, we will only comment on those aspects of the cost estimates which fall within our ken of knowledge. There is no question that ending the HIV travel and immigration ban will have some cost to the United States, but the toll the ban has taken on individuals affected and the toll the ban has taken on the reputation of the United States is immeasurable. In the end, the primary reason to lift the ban is that it is the right thing to do. Nonetheless we will briefly discuss the cost issue as it relates to immigration issues.

### Cost – Limited Access to Means-Tested Benefits

Under current law most LPRs are unable to access any means-tested benefits during the first five years of their residence here. Moreover, the most common categories of LPR application require a relative to submit an affidavit of sponsorship for the applicant. The income of the sponsor is “deemed” to be available to the new LPR, which again, has the effect of generally making means-tested benefits unavailable to the LPR during his or her first five years in the U.S.<sup>15</sup> LPRs are eligible to apply for citizenship 5 years after obtaining LPR status (the waiting period is reduced to 3 years for spouses of U.S. citizens.) Likewise the current law requires the income of the sponsoring American to be “deemed” available to the new LPR. Since the sponsor must demonstrate sufficient income and assets to support the LPR applicant, this deeming provision again basically means that a new LPR will be unable to show financial eligibility for means tested benefits.

### Cost – Already Offset by Congress in Passing the PEPFAR Bill

Last summer, Congress passed the Tom Lantos and Henry J. Hyde Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, known colloquially as the President’s Emergency Plan for AIDS Relief, or PEPFAR bill. This bill authorized funding for fighting AIDS around the world, and also removed the statutory requirement that HHS include HIV on the list of communicable diseases of public health significance. Because the Congressional Budget Office (“CBO”) estimated that lifting the HIV travel and immigration ban would increase government spending, Section 501 of the law requires the Department of State to raise certain visa fees by \$1 beginning in 2011. According to the CBO estimate, this increased visa fee would increase revenue by \$104 million in the period from 2011-2018.<sup>16</sup> In assessing the cost of the proposed regulations, it does not appear that HHS has calculated in this revenue which will increase as a direct result of the legislation lifting the HIV ban.

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<sup>15</sup>Personal Responsibility Work and Opportunity Reconciliation Act (PRWORA), Pub. Law No. 104-193, 110 Stat. 2105.

<sup>16</sup>Congressional Budget Office Estimate, Tom Lantos and Henry J. Hyde Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, October 8, 2008 available at <http://www.cbo.gov/ftpdocs/98xx/doc9866/hr5501.pdf>.



## **HHS IS MAKING THE RIGHT DECISION TO END MANDATORY HIV TESTING AS PART OF THE ROUTINE MEDICAL EXAMINATION**

### **No Legal Authority for Testing**

HHS is specifically seeking comments on whether its proposal to eliminate HIV testing as part of the alien medical exam is the best approach. Immigration Equality strongly agrees that HIV testing should be removed from the medical examination. HHS regulations lay out the scope of the medical examination that DHS requires of aliens. These requirements include testing for the illnesses which HHS has designated “communicable diseases of public health significance.” There is no precedent, however, for HHS requiring any alien to be tested for any condition other than those that are enumerated in the regulations. As the prefatory material to the regulations and the Congressional record for PEPFAR make clear, one of the primary reasons to remove HIV from the list of communicable diseases is to reduce the stigma and discrimination that have surrounded the treatment of HIV in a manner completely different from all other illnesses. If HIV were now to be singled out as the only virus which is not on the HHS communicable disease list, but which nonetheless requires its own mandatory test, HIV would continue to be treated differently from all other medical conditions, and there would be little change in the effort to reduce stigma and discrimination against individuals with HIV.

We further believe that HHS lacks the legal authority to continue to mandate HIV testing as part of the medical examination when it is no longer considered a communicable disease of public health significance. We believe that if HHS were to require HIV testing after removing HIV from the communicable disease list, litigation on this issue would be likely.

### **There Are Tremendous Problems with the HIV Testing Process in the Medical Exam in the United States**

The CDC sets the standards for DHS medical examinations conducted within the United States. These standards require pre-test HIV counseling for everyone undergoing the examination and post-test counseling for all who test positive.<sup>17</sup> Immigration Equality has found that its clients rarely receive this required counseling. Furthermore, in 2009, Georgetown Law School’s Human Rights Clinic authored a report on the HIV ban which will be published in the Georgetown Immigration Law Journal, hereinafter, “Georgetown Report.” Part of their report included original research in the U.S. and in Haiti about how the HIV ban is currently being administered. The Georgetown Report includes several troubling instances of mishandling of HIV examinations on behalf of LPR applicants in Miami. These include applicants who were not given their positive HIV test results at all by the civil surgeon who tested them; individuals who

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<sup>17</sup>See Technical Instructions for Panel Physicians (available at: [www.cdc.gov/ncidod/dq/pdf/ti/alien.pdf](http://www.cdc.gov/ncidod/dq/pdf/ti/alien.pdf)); see also Technical Instructions for Civil Surgeons (available at: <http://www.cdc.gov/ncidod/dq/pdf/ti-civil.pdf>).

were not given copies of their test results and thus learned that they were HIV-positive from immigration officials; and immigration officials disclosing applicants' HIV status in front of family members who were not previously aware of the applicants' status.<sup>18</sup> Despite the CDC's best intentions in providing guidance on how alien medical examinations should be conducted, it is clear that many civil surgeons are not following the CDC recommendations and that LPR applicants are suffering the consequences.

These problems with existing testing procedures illustrate why HHS has correctly determined that HIV testing should not be part of the routine medical examination. Individuals should be tested for HIV voluntarily and by physicians who are trained to provide the necessary counseling to accompany the testing.

### **Problems with HIV Testing Abroad Are Even Greater than Those within the U.S.**

Despite the myriad problems with HIV testing associated with adjustment of status applications in the United States, the problems are far worse for those being tested abroad in foreign countries where they may be no legal requirement for keeping HIV information confidential or where there may not be a medical culture that encourages confidentiality. For example, the Georgetown Report investigated HIV testing administered in Haiti as part of lawful permanent immigrant applications for consular processing there. The Georgetown Report revealed that individuals who tested positive for HIV received no counseling from the physician. In some instances neither the testing physician nor the official at the U.S. consulate told the applicant that he or she was HIV-positive. Applicants were not told that they had HIV; rather they were left to figure this out on their own based on the paperwork they received concerning the HIV waiver, without being given any instructions about what this meant.<sup>19</sup>

Equally troubling in the Georgetown Report was the complete lack of confidentiality for individuals who tested positive for HIV. There were only certain days of the week that HIV-positive visa applicants would be processed and they were forced to stand on a special line, essentially disclosing to all other visa applicants that they were HIV-positive.

#### *"Katiana's" Story*

*I am Haitian, and my brothers, mother, and stepfather are all in the U.S. I first submitted my visa application in 1993 with the help of my mother. I didn't know anything about HIV until I was forced to get tested as part of the visa application process. When I found out I had HIV, I was afraid to tell my family. I felt so depressed and embarrassed, I terminated my visa application. . . At first the Embassy officials thought that they had lost my file. Eventually they found it but had a hard time believing*

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<sup>18</sup>Georgetown Report at 12, on file with Immigration Equality.

<sup>19</sup>Georgetown Report at 13.



*it was mine. They said, "This can't be you; you should already be dead by now." Officials at the Embassy are rude to people with HIV, and anybody who works at the Embassy knows that you have HIV/AIDS because there are only certain days people with health problems can come to the Embassy. Even on those days, there are special lines inside the Embassy for people with HIV/AIDS. I feel I have lost ten years of my life going through the waiver process. I am lucky because my mother has agreed to continue to sponsor me, but I am embarrassed because I am an adult and my mother still has to support me. If I were in the U.S., I could support myself and my mother wouldn't have to send money to Haiti. This system is not right.<sup>20</sup>*

According to the Georgetown Report, lack of counseling, lack of confidentiality, and outright prejudice towards immigration applicants testing positive for HIV, were the norm for individuals applying to consular process from Haiti. It is clear from this treatment that the HIV ban not only damages the lives of individuals who cannot be with their families in the U.S. as a result of the ban, but that the ban itself encourages further stigmatization of people living with HIV in Haiti. For these reasons, it is essential that HHS removes HIV testing from the routine medical examination for immigrants.

## CONCLUSION

Immigration Equality applauds HHS for its decision to remove HIV from its list of "communicable diseases of public health significance" and to end HIV testing as part of the routine medical examination. For two decades, the HIV ban on travel and immigration has been an international embarrassment to the United States as we position ourselves as a world leader in fighting the HIV pandemic. Moreover, individuals with HIV have been unable to visit the U.S. or immigrate to the U.S. because of a complex, poorly administered waiver process. Likewise, HIV testing as part of the immigrant medical examination has been poorly done and has not comported with accepted standards of counseling and confidentiality. For all of these reasons, we hope that HHS will issue the proposed regulations as final regulations as expeditiously as possible.

Respectfully Submitted,~

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<sup>20</sup>Georgetown Report at 11.